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# Florence v. Board of Chosen Freeholders: Police Power Takes a More Intrusive Turn

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### Recommended Citation

Wayne A. Logan, *Florence v. Board of Chosen Freeholders: Police Power Takes a More Intrusive Turn*, 46 *AKRON L. REV.* 413 (2013),  
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## ***FLORENCE V. BOARD OF CHOSEN FREEHOLDERS: POLICE POWER TAKES A MORE INTRUSIVE TURN***

*Wayne A. Logan*<sup>†</sup>

I.	<i>Florence</i> Facts and Holding.....	415
II.	Arrest Authority and Its Consequences .....	420
III.	Looking Ahead .....	429
IV.	Conclusion .....	431

Over thirty years ago, Professor Malcolm Feeley published *The Process Is the Punishment*,<sup>1</sup> providing what remains the classic account of the nation's unceremonious treatment of individuals ensnared in a minor offense-dominated, high-volume urban court system. As Professor Feeley demonstrated, when it comes to minor offense arrestees, the taxing, delay-ridden and confusing adjudicatory process itself is punitive, very often dwarfing the personal consequences of *de jure* punishment levied by the state.<sup>2</sup> Unfortunately, despite the passage of time, recent work has made clear that the adjudicatory experience of low-level offenders has not appreciably changed for the better.<sup>3</sup>

This past Term, however, in *Florence v. Board of Chosen Freeholders of the County of Burlington*,<sup>4</sup> the Supreme Court allowed the pre-adjudicatory experience of minor offense arrestees to become significantly more intrusive in character. By a 5-4 vote, the Court held that such persons can be subjected to body cavity visual searches,

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1. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1st ed. 1979).

2. *Id.* at 199.

3. See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009), available at <http://www.nacdl.org/reports/>; Jenny Roberts, *Why Misdemeanor Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157 (2004).

4. 132 S. Ct. 1510 (2012).

without regard for arrest basis or reason to suspect that they possess a weapon or contraband.<sup>5</sup>

This symposium affords an opportunity to reflect upon the combined force of *Florence* and one of its foundational precedents, also decided by a 5-4 vote: *Atwater v. City of Lago Vista*.<sup>6</sup> In *Atwater*, the Court afforded police explicit authority to arrest individuals for very minor offenses (there failure to wear a seatbelt) without a warrant, paving the way not only for arrests such as experienced by Albert Florence, but also a myriad of others, based on laws contained in state, local and federal codes.<sup>7</sup> With *Atwater*, the Court refused to limit the governmental power to subject individuals to the trauma and inconvenience of arrest; with *Florence*, the Court significantly augmented the personal consequences of arrest, allowing visual inspections of individuals' most intimate areas by jail personnel.<sup>8</sup>

This paper starts with an overview of *Florence*, discussing its facts and holding. Part II examines the critically important way in which *Florence* builds upon the already expansive discretionary authority of police to arrest individuals for minor offenses. Part III and the Conclusion consider possible future developments.

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5. *Id.* at 1523.

6. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

7. *Id.* at 342.

8. To those familiar with the Court's recent Fourth Amendment case law more generally, the result in *Florence* perhaps came as no surprise. Indeed, the facts giving rise to Albert Florence's arrest afforded a microcosm of the Court's modern inclination to back discretionary authority of executive actors. While the reason for the initial auto stop by police remains unknown, Florence suggested that it was because he and his wife (and their accompanying four-year-old child) were African-Americans in a BMW sport utility vehicle. See Petition for a Writ of Certiorari, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 220710 at \*3. Even if he was indeed stopped on the basis of this pretext, the seizure would have been permissible under the Fourth Amendment, based on the Court's ruling in *Whren v. United States*, 517 U.S. 806, 808 (1996). Subsequent to the traffic stop, Florence was informed by police that he was subject to arrest based on an outstanding arrest warrant for failure to pay a fine, and was in fact arrested on this basis, even though he told the arresting officer that he had long ago paid the fine and that the arrest warrant was therefore invalid. See *Florence*, 132 S. Ct. at 1514. Florence was thus like the petitioner in *Devenpeck v. Alford*, 543 U.S. 146, 149-50 (2004), who fruitlessly tried to rectify a legal misunderstanding by an arresting officer. Just as Alford showed the arresting officer an actual appellate opinion undercutting the legal basis for his arrest, Florence provided police proof that he had paid his fine, yet was still taken into custody. Petition for a Writ of Certiorari, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 220710 at \*3. Under *Herring v. United States*, 555 U.S. 135, 137 (2009), moreover, police can rely on arrest warrant databases that later prove to be mistaken.

I. *FLORENCE* FACTS AND HOLDING

Albert Florence's travail began in March 2003, when the car in which he was riding, driven by his then-pregnant wife, was stopped by a State Trooper in Burlington County, New Jersey.<sup>9</sup> Upon learning that Florence was the vehicle's owner, the trooper conducted a database records search, which indicated that he was the subject of a bench warrant in Essex County, based on his purported failure to pay a fine.<sup>10</sup> Florence informed the trooper that the warrant was invalid because he had paid the fine within a week of the warrant's issuance, two years before, and his wife presented a document showing proof of payment.<sup>11</sup> Without first attempting to verify Florence's assertion, the trooper took Florence into custody by handcuffing him and transporting him to the police barracks.<sup>12</sup> His later protestations of innocence were met with the response that only police in Essex County could rectify any error, and that in the meantime he would be taken to the Burlington County jail.<sup>13</sup>

After arriving at the jail, Florence was required to remove his clothes and ordered to open his mouth, lift his tongue and arms, and elevate his genitals for visual inspection.<sup>14</sup> Although no weapons or contraband were discovered, Florence remained at the Burlington jail for six days.<sup>15</sup> During this time, officials made no effort to confirm the validity of the arrest warrant, and his family tried without success to secure his release.<sup>16</sup> Florence eventually was transferred to Essex County, where he again was subject to search.<sup>17</sup> He and four other detainees were ordered to a shower area and told to remove their clothes and, under the supervision of two officers, open their mouths, lift their genitals, and turn around, squat and cough.<sup>18</sup>

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9. The factual account provided is contained in the certiorari petition. See Petition for a Writ of Certiorari, *supra* note 8, at \*3.

10. *Id.*

11. *Id.*

12. *Id.* at \*\*3-4. No ticket for the alleged traffic violation was issued and the basis for the initial stop was never specified. *Id.* at \*4.

13. *Id.*

14. *Id.* at \*5.

15. *Id.*

16. *Id.* at \*5-6.

17. *Id.* at \*6. The policy of the Essex County facility required that persons arrested for any and all violations be subject to visual cavity searches, whereas the policy in Burlington County (consistent with New Jersey law) prohibited such searches unless the arrest was for a "crime" and there existed reasonable suspicion that the arrestee possessed a weapon, controlled substance or contraband. *Id.* at \*\*5-6. Florence's alleged misconduct, failure to pay a fine, constituted civil contempt in New Jersey, a non-criminal offense. *Id.* at \*4.

18. *Id.* at \*7.

The next day, eight days after first being taken into custody, a hearing was held before an Essex County judge who was “appalled” that the warrant for Florence’s arrest existed in the first instance and ordered his immediate release.<sup>19</sup> Florence thereafter filed a federal civil rights suit under 42 U.S.C. § 1983, challenging his suspicionless strip searches by county officials on Fourth and Fourteenth Amendment grounds.<sup>20</sup> A federal trial court granted Florence’s motion for summary judgment,<sup>21</sup> and the Third Circuit reversed by a 2-1 vote.<sup>22</sup> A circuit split having developed on the constitutionality of subjecting minor offense arrestees to suspicionless strip searches,<sup>23</sup> the Supreme Court granted certiorari.<sup>24</sup>

By a 5-4 vote, the Court upheld the Third Circuit, rejecting Florence’s constitutional claim.<sup>25</sup> In an opinion written by Justice Kennedy,<sup>26</sup> the Court commenced its analysis by emphasizing its precedent affording deference to prison and jail administrators in their operation of correctional facilities, including with respect to searches for weapons and contraband.<sup>27</sup> Consistent with this position, the Court concluded that it would be “unworkable” to impose a requirement that any search of a minor offense arrestee must be supported by reasonable suspicion to believe that the arrestee was hiding a weapon or contraband.<sup>28</sup> “People detained for minor offenses . . . turn out to be the

19. *Id.*

20. *Id.* The suit was later certified as a class action involving individuals subjected to similar treatment in Essex and Burlington Counties. *Id.*

21. *Florence v. Bd. of Chosen Freeholders of Burlington*, 595 F. Supp. 2d 492, 519 (D. N.J. 2009).

22. *Florence v. Bd. of Chosen Freeholders of Burlington*, 621 F.3d 296, 311 (3d Cir. 2010).

23. Eight circuits, over the course of several years, condemned the practice of strip and/or body cavity searches. *See Jimenez v. Wood Cnty., Tex.*, 660 F.3d 841 (5th Cir. 2011) (en banc); *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981). Two circuits other than the Third Circuit found no Fourth Amendment problem with the practice. *See Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

24. *See Florence v. Bd. of Chosen Freeholders of Burlington*, 131 S. Ct. 1816 (2011).

25. *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510 (2012).

26. Justice Scalia joined Justice Kennedy’s opinion *in toto*, Justice Thomas joined in all but Part IV, and Chief Justice Roberts and Justice Alito filed separate concurring opinions. *Id.*

27. *Florence*, 132 S. Ct. at 1515-17 (citing, *inter alia*, *Hudson v. Palmer*, 468 U.S. 517 (1984), *Block v. Rutherford*, 468 U.S. 576 (1984), and *Bell v. Wolfish*, 441 U.S. 520 (1979)).

28. *Florence*, 132 S. Ct. at 1520 (“It is reasonable . . . for correctional officials to conclude that this standard of [individualized reasonable suspicion] would be unworkable.”) (alteration to original); *see also id.* at 1522 (“The officials in charge of the jails in this case urge the Court to reject any complicated constitutional scheme requiring them to conduct less thorough inspections of some detainees . . . . They offer significant reasons why the Constitution must not prevent them

most devious and dangerous criminals,”<sup>29</sup> Justice Kennedy observed, and authorities can lack reliable information on arrestees’ backgrounds and criminal histories.<sup>30</sup> Furthermore, imposing a case-by-case requirement presented administrability challenges: “[Authorities] would be required, in a few minutes, to determine whether any of the underlying offenses [triggering arrest] were serious enough to authorize [a strip search] . . . . To avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary work for the entire jail population.”<sup>31</sup> The Court had addressed the “analogous problem” in *Atwater v. City of Lago Vista*, Justice Kennedy wrote, where it refused to require law enforcement officers in the field to distinguish arrestable from non-arrestable minor offenses; jail administrators have an equally “essential interest in readily administrable rules.”<sup>32</sup>

In Part IV of the opinion, Justice Kennedy signaled that some future strip search scenario might raise constitutional concern, noting that “[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general population and without substantial contact with other detainees.”<sup>33</sup> He also alluded to possible potential future concern over authorities “engaging in intentional humiliation and other abusive practices” and the “invasiveness of searches that involve the touching of detainees.”<sup>34</sup> Such concerns, however, were not implicated in Florence’s claim.<sup>35</sup>

The two concurrences, filed by Chief Justice Roberts and Justice Alito, agreed with the result and reasoning of Justice Kennedy’s opinion, but signaled some possible reservations.<sup>36</sup> Chief Justice Roberts

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from conducting the same search on any suspected offender who will be admitted to the general population in their facilities.”).

29. *Id.* at 1520 (noting, *inter alia*, the arrest of Oklahoma City bomber Timothy McVeigh for a minor offense).

30. *Florence*, 132 S. Ct. at 1521 (“In the absence of reliable information it would be illogical to require officers to assume the arrestees in front of them do not pose a risk of smuggling something into a facility.”).

31. *Id.* at 1522 (alterations to original).

32. *Id.* (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)).

33. *Florence*, 132 S. Ct. at 1522; *see also id.* at 1523 (“The accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue.”).

34. *Id.*

35. *Id.* As noted, Justice Thomas signed on to all but Part IV of the Court’s opinion, suggesting that he would not be reluctant to reject a constitutional claim, even under such circumstances. *See supra* note 26.

36. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524-25 (Alito, J., concurring).

emphasized that the Court, in Part IV, did not “foreclose the possibility of an exception to the rule it announces.”<sup>37</sup> He emphasized that “Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.”<sup>38</sup> The Chief Justice concluded by offering that “[t]he Court makes a persuasive case for the general applicability of the rule it announces. The Court is nonetheless wise to leave open the possibility of exceptions, to ensure that we ‘not embarrass the future.’”<sup>39</sup>

In his concurrence, Justice Alito “emphasize[d] the limits of [the] holding”: that “jail administrators may require all arrestees *who are committed to the general population of a jail* to undergo visual strip searches not involving physical contact by corrections officers.”<sup>40</sup> “As part of the inspection,” he added, “arrestees may be required to manipulate their bodies,”<sup>41</sup> an experience he acknowledged as “undoubtedly humiliating and deeply offensive to many.”<sup>42</sup> Like Chief Justice Roberts, he found no constitutional fault with the searches experienced by Florence and his fellow class members, but noted that the Court did “not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population.”<sup>43</sup>

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented.<sup>44</sup> The dissent, unlike Chief Justice Roberts and Justice Alito, took no solace in the purported narrowness of the Court’s opinion, reaching minor offense arrestees destined for the “general population” of a jail.<sup>45</sup> The dissent emphasized the intrusiveness of strip searches<sup>46</sup> and

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37. *Id.* at 1523 (Roberts, C.J., concurring).

38. *Id.*

39. *Id.* (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944) (Frankfurter, J., concurring)).

40. *Id.* at 1524 (Alito, J., concurring).

41. *Id.*

42. *Id.*

43. *Id.*; see also *id.* at 1525 (“The Court does not address whether it is always reasonable, without regard to the offense or the reason for the detention, to strip search an arrestee before the arrestee’s detention has been reviewed by a judicial officer . . . . In light of that limitation, I join the opinion of the Court in full.”).

44. *Id.* at 1525 (Breyer, J., dissenting).

45. *Id.* at 1532.

46. *Id.* at 1526 (“A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person’s body, is a serious invasion of privacy . . . . Even when carried out in a respectful manner, and even absent any physical touching, such searches are inherently harmful, humiliating, and degrading.”); *id.* at 1528 (noting

noted that the scope of minor offense arrestees in the class action suit before the Court not only included Florence—arrested (erroneously) for failing to pay a civil fine—but also persons arrested for trespass during an anti-war demonstration, driving with a noisy muffler and riding a bicycle with an inaudible bell.<sup>47</sup> Nor was the dissent persuaded that institutional or administrative needs precluded the Court from limiting searches to minor offense arrestees who pose a risk of possessing weapons and/or contraband. The dissent pointed to studies finding very low rates of detection out of many thousands of strip searches conducted,<sup>48</sup> the recommendations of professional bodies such as the American Correctional Association against suspicionless strip searches,<sup>49</sup> and the use of a reasonable suspicion-based standard by entities (including the U.S. Marshals Service)<sup>50</sup> and several states.<sup>51</sup>

The dissent closed by sharing Justice Alito’s “intuition that the calculus may be different” for persons arrested for minor offense crimes not subject to judge-approved admission to the general jail population.<sup>52</sup> As far as the dissent was concerned, “[i]n an appropriate case . . . it remains open for the Court to consider whether it would be reasonable to admit an arrestee for a minor offense to the general population, and to subject her to the ‘humiliation of a strip search,’ prior to any review by a judicial officer.”<sup>53</sup>

After *Florence*, individuals arrested for minor offenses can be subject to inspections of their most intimate bodily areas, without any particularized suspicion that they possess weapons or contraband, prior to being relegated to a facility’s “general jail population.”<sup>54</sup> Despite the assessment of the dissent, and the guarded language of the two concurrences, it is not altogether clear what future set of facts might convince a majority of the Court to find a Fourth Amendment violation. Both concurrences (votes four and five of the majority, by Chief Justice

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that a strip search presents a “serious affront to human dignity and to individual privacy”).

47. *Id.* at 1527.

48. *Id.* at 1528-29.

49. *Id.* at 1529.

50. *Id.*

51. *Id.* at 1529-30.

52. *Id.* at 1531.

53. *Id.* at 1532 (quoting *id.* at 1524 (Alito, J., concurring)).

54. The Court did not elaborate on the “general jail population” requirement, other than to mention that it was not required to “rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.” *Id.* at 1522. It would appear, however, that unless an arrestee is placed in solitary confinement, there could be risk of “substantial contact with other detainees,” justifying application of *Florence*.



Roberts and Justice Alito) deemed it important that the two New Jersey facilities had no available alternative to putting Florence in the general population,<sup>55</sup> impliedly refusing to force such an alternative on them. Moreover, the searches experienced by Florence took place before a judicial officer had an opportunity to review his case, which Justice Alito stated might raise concern,<sup>56</sup> a fact that for some reason did not prompt concern *vis-à-vis* Florence.<sup>57</sup>

Finally, the Chief Justice's point that Florence was detained not for a "minor traffic offense but instead pursuant to a warrant for his arrest"<sup>58</sup> affords little reason for civil libertarians to take solace. As the next part makes clear, a welter of minor offenses—not involving traffic—can trigger warrantless arrest, and arrest warrants (even valid ones, unlike in Florence's case) fail to provide a significant constitutional limit.

## II. ARREST AUTHORITY AND ITS CONSEQUENCES

As noted at the outset, *Florence* builds upon the Court's prior case law refusing to limit the discretionary authority of criminal justice executive actors, especially the Court's 2001 decision in *Atwater v. City of Lago Vista*.<sup>59</sup> In *Atwater*, a five-member majority of the Court upheld the authority of police, acting without a warrant, to arrest in public an individual for a fine-only offense (failure to wear a seatbelt while driving).<sup>60</sup> The Court, as Justice Kennedy's *Florence* opinion noted, rejected a case-by-case approach informed by whether arrest was justified under the particular circumstances,<sup>61</sup> preferring instead to have

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55. *Id.* at 1523 (Roberts, C.J., concurring) (deeming it important that the two New Jersey facilities where Florence was strip searched had "no alternative, if Florence was to be detained, to holding him in the general jail population"); *id.* at 1524 (Alito, J., concurring) (stating that a suspicionless strip search "may not be reasonable, particularly if an alternative procedure is feasible[.]" such as a segregation unit for minor offense temporary detainees).

56. *See id.* at 1524 (Alito, J., concurring) ("It is important to note . . . that the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population.").

57. Presumably, this was because the New Jersey facilities did not have an alternative to placing Florence in the general population if he was to be detained. *See id.* As noted in the text, however, the Court found no constitutional fault with this absence, and did not require an alternative, allowing jailers to continue strip searches under the circumstances in *Florence*.

58. *Id.* at 1523.

59. 532 U.S. 318 (2001).

60. *Id.* at 354. Under Texas law, violation of the law could result, at most, in a \$50 fine. *Id.* at 323 (citing TEX. TRANSP. CODE ANN. § 545.413(d) (West 2011)).

61. The Court rejected, for instance, any requirement that might turn on the relative gravity of the minor offense allegedly committed:

It is not merely that we cannot expect every police officer to know the details of

the constitutional reasonableness of an arrest turn on whether probable cause existed to support an officer's belief that a "very minor criminal offense in his presence" occurred.<sup>62</sup> Ultimately, the *Atwater* majority questioned whether police authority to exercise discretion to undertake arrests for such offenses "need[ed] constitutional attention,"<sup>63</sup> based on what it saw as the "dearth of horrors demanding redress"<sup>64</sup> and its assessment that the country surely was "not confronting anything like an epidemic of unnecessary minor-offense arrests."<sup>65</sup>

As I have highlighted elsewhere, the Court's take on the actual empirical record at the time of *Atwater* fell well short of the mark.<sup>66</sup> Even based on reported case law, which surely understates the full nature and extent of arrests,<sup>67</sup> the police commonly arrested individuals for a wide range of traffic (e.g., speeding, driving with a broken taillight) and non-traffic-related offenses (e.g., illegal parking, littering, riding a bicycle on a sidewalk, civil contempt based on a civil bench warrant (as in *Florence*), eating food on a subway, drinking in public, and underage drinking).<sup>68</sup> Since being handed down in 2001, *Atwater* has often been invoked by state and lower federal courts to back police arrests of similar kind.<sup>69</sup> Despite four members of the Court expressing "hope" shortly

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frequently complex penalty schemes . . . but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of the arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge?

*Atwater*, 532 U.S. at 348-49.

62. *Id.* at 354.

63. *Id.* at 351.

64. *Id.* at 353.

65. *Id.*

66. See Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 429-31 (2002).

67. *Id.* at 430 (citing reasons including, *inter alia*, the common disincentive to pursue litigation in absence of long-term deprivation of physical liberty).

68. *Id.* at 431.

69. See, e.g., *Tanberg v. Sholtis*, 401 F.3d 1151, 1159 (10th Cir. 2005) (applying New Mexico law) (violating a city ordinance for remaining in a public park after hours); *United States v. Pratt*, 355 F.3d 1119, 1123 (8th Cir. 2004) (applying Missouri law) (jaywalking); *Hudson v. State*, No. CACR00-1013, 2001 WL 541069, at \*1 (Ark. Ct. App. May 23, 2001) (violating a city ordinance for remaining in a public park after hours); *People v. McKay*, 41 P.3d 59, 71 (Cal. 2002) (riding a bicycle the wrong direction on a residential street); *People v. Lambert*, No. D052435, 2009 WL 1091704, at \*2 (Cal. Ct. App. Apr. 23, 2009) (driving a car with a hole in the car's license plate); *People v. Bybee*, No. B171855, 2004 WL 1689782, at \*8 (Cal. Ct. App. July 29, 2004) (driving a bike against traffic); *People v. Lopez*, No. HO24173, 2003 WL 21942954, at \*5 (Cal. Ct. App. Aug. 14, 2003) (possessing an open container of alcohol in public); *People v. Fennell*, No. B144396, 2001 WL 1190768, at \*4 (Cal. Ct. App. Oct. 1, 2001) (making an illegal turn while

after *Atwater* that the Court would reexamine the outcome in *Atwater* if “experience demonstrates ‘anything like an epidemic,’”<sup>70</sup> no such reconsideration has taken place.<sup>71</sup>

In addition to figuring centrally in the *Florence* majority opinion,<sup>72</sup> *Atwater* has played a lynchpin role in the Court’s Fourth Amendment jurisprudence more generally. *Virginia v. Moore* affords a critical example in this regard.<sup>73</sup> Making ample use of *Atwater* as precedent,<sup>74</sup> *Moore* concluded that state statutory limits on police discretionary arrest authority for minor offenses (in *Moore*, driving with a suspended license) were immaterial for Fourth Amendment purposes. Invoking *Atwater*’s “probable cause standard,”<sup>75</sup> and reasserting the absence of any “epidemic” of “horribles” requiring redress,<sup>76</sup> *Moore* dashed lingering hope that a non-constitutional limit might be brought to bear, suggested in *Atwater* itself.<sup>77</sup>

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driving); *State v. Barros*, 48 P.3d 584, 593 (Haw. 2002) (jaywalking); *State v. Roche*, 928 So. 2d 761, 766-67 (La. Ct. App. 2006) (possessing an open container of alcohol in public); *State v. Mercante*, 836 So. 2d 596, 600 (La. Ct. App. 2002) (public urination); *State v. Brown*, No. 18972, 2001 WL 1657828, at \*1 (Ohio Ct. App. Dec. 28, 2001) (jaywalking); *State v. Wilkenson*, 769 N.E.2d 430, 433 (Ohio Com. Pleas. 2001) (driving a car with a non-working headlight); *Brown v. State*, No. 13-05-243-CR, 2006 WL 2025145, at \*2 (Tex. App. July 20, 2006) (riding a bike without a headlight); ); *Nicholson v. State*, No. 05-00-01401-CR, 2001 WL 515919, at \*3 (Tex. App. May 16, 2001) (driving with an expired vehicle registration sticker); *Collins v. State*, No. 14-00-00814-CR, 2001 WL 664644, at \*2 (Tex. App. June 14, 2001) (walking in a roadway). In the District of Columbia, officers can arrest for 159 minor offenses including operating a radar detector, storing building materials in an alley, climbing a street lamp, and digging for fishing bait in Rock Creek Park. See METRO. POLCE DEP’T, D.C., STANDARD OPERATING PROCEDURES (Nov. 2005), available at <http://www2.justiceonline.org/dcmpd/SOP-PD-Form-61D.pdf>.

70. See *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (quoting *Atwater*, 532 U.S. at 353) (Ginsburg, J., concurring, joined by O’Connor, Breyer, and Stevens, J.J.).

71. A handful of states, it is worth noting, have rejected *Atwater* on state constitutional grounds. See, e.g., *State v. Askerooth*, 681 N.W.2d 353, 361-62 (Minn. 2004); *State v. Bayard*, 71 P.3d 498, 501-02 (Nev. 2003); *State v. Rodarte*, 125 P.3d 647, 650-51 (N.M. Ct. App. 2005); *State v. Brown*, 792 N.E.2d 175, 176-77 (Ohio 2003).

72. See *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1517, 1522-23 (2012).

73. *Virginia v. Moore*, 553 U.S. 164 (2008).

74. See *id.* at 171-76.

75. *Id.* at 171 (“[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.”); see also *id.* at 178 (“When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.”). Notably, *Atwater*—decided in 2001—served as the anchor of the *Moore* Court’s reference to the “long line” of cases equating probable cause with constitutional reasonableness, the historical verity of which was justly questioned by Justice Ginsburg in her *Moore* concurrence. *Id.* at 178-80 (Ginsburg, J., concurring).

76. *Id.* at 175.

77. *Id.* at 175-76. In the wake of *Moore*, courts have refused to find that violation of other

In addition to having enormous practical significance, *Atwater* and its progeny beg the basic question of what can qualify as an “offense” sufficient to permit arrest, resulting in processing by the criminal justice system. In *Atwater*, the Texas Legislature had expressly authorized (but did not require) police to arrest violators of the seat belt law,<sup>78</sup> which the Supreme Court characterized as a “very minor criminal offense.”<sup>79</sup> In *Moore*, on the other hand, the Court ignored the Virginia Legislature’s express denial of arrest power authority *vis-à-vis* driving with a suspended license, requiring instead that a summons be issued under the circumstances.<sup>80</sup> Recently, courts have been asked to consider the scope of arrest authority relative to civil and quasi-civil violations of law,<sup>81</sup> pressing beyond *Atwater*’s already very low offense seriousness threshold.<sup>82</sup>

In perhaps the most sweeping decision on the matter to date, the Seventh Circuit, in an opinion written by Judge Richard Posner, turned back a class action brought by individuals arrested for not paying parking tickets, sanctioned by a monetary penalty that could not even be classified as a fine.<sup>83</sup> Judge Posner, relying on *Atwater*, wrote that “[e]ven arrests for violations of purely civil laws are common enough, and usually unexceptionable—examples that spring to mind are arrests for civil violations of the immigration laws (such as overstaying a visa) and for civil contempt.”<sup>84</sup> Citing *Moore*, Judge Posner added that “[t]he Supreme Court has held that if an arrest is otherwise reasonable, the fact that it is not for an ‘arrestable’ offense does not make it unconstitutional.”<sup>85</sup>

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statutorily imposed arrest constraints, including relative to the geographical/jurisdictional reach of officers’ arrest powers, raise Fourth Amendment concern. See, e.g., *United States v. Turner*, 553 F.3d 1337, 1346 (10th Cir. 2009) (citing *Moore* and rejecting impact of Colorado limit).

78. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

79. *Id.*

80. *Moore*, 553 U.S. at 167.

81. See, e.g., *United States v. Perdona*, 621 F.3d 745, 749 (8th Cir. 2010) (upholding arrest for possession of less than one ounce of marijuana, a civil infraction under Nebraska law); *United States v. Burton*, 599 F.3d 823, 827-28 (8th Cir. 2010) (upholding arrest for open container violation, a civil infraction under Nebraska law); *Thomas v. City of Peoria*, 580 F.3d 633, 638 (7th Cir. 2009) (upholding arrest based on arrest warrant for unpaid parking tickets, a civil non-jailable offense under Illinois law).

82. The petitioner in *Florence*, it will be recalled, was arrested for the non-indictable offense of civil contempt; the constitutional validity of his arrest was not before the Court.

83. *Thomas*, 580 F.3d at 634-39.

84. *Id.* at 638. As in *Florence*, the arrest of the main Petitioner was based on a faulty arrest warrant system: in *Thomas*, the arresting officer acted on the belief that the arrestee was “Joshua A.” when he was actually “Joseph A.” *Id.* at 635.

85. *Id.* at 637 (citing *Moore*, 553 U.S. at 174-75).

Whether such a position is defensible is open to serious question for as one federal trial judge observed “[t]he concept of probable cause makes sense only in relation to a criminal offense.”<sup>86</sup> Nevertheless, while scholars have long debated the question of what conduct can qualify as a “crime,”<sup>87</sup> doctrinal developments are in the process of mooted the practical importance of the distinction.

Yet, in order to grasp the full extent of modern police arrest authority, other considerations must be taken into account. First, it is important to recognize that the constitutional *sine qua non* of any arrest—probable cause—is not only not susceptible of precise meaning;<sup>88</sup> it is rather easy to satisfy<sup>89</sup> and can be based on officers’ reasonable mistakes of fact.<sup>90</sup> In addition, as a result of the Court’s decision in *Devenpeck v. Alford*,<sup>91</sup> arrests can be based on grounds other than those identified by police at the time of arrest. The constitutional reasonableness of an arrest is based on “facts known to the arresting officer,”<sup>92</sup> not her assessment of the precise legal basis for arrest.<sup>93</sup> An officer’s “subjective reason for making the arrest need not be the

86. McKinney v. Fields, No. 07-cv-10652, 2010 WL 3583017, at \* 6 (E.D. Mich. Sept. 10, 2010). See also Doe v. Metro. Police Dep’t of D.C., 445 F.3d 460, 461 (D.C. Cir. 2006) (holding that a state statute that is unambiguously civil in nature cannot constitute a proper basis for arrest).

87. See, e.g., Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); see also Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335 (2000).

88. See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (noting that probable cause is a “fluid” concept “not readily . . . reduced to a neat set of legal rules”); *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (“Articulating precisely what . . . ‘probable cause’ mean[s] is not possible”). The Court has also haphazardly conflated probable cause with lesser standards such as reasonable suspicion and reasonable cause. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (stating that the substance of probable cause is reasonable suspicion of guilt).

89. See *Valdez v. McPheters*, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999) (noting that “probable cause itself is a relatively low threshold of proof”). In addition, qualified immunity case law affords police added cushion to exercise their arrest discretion. See *Durham v. Horner*, 690 F.3d 183, 190 (4th Cir. 2012) (“[E]ven if the existence of probable cause were a close question, the ‘qualified immunity standard gives ample room for mistaken judgments.’ Indeed, qualified immunity protects public officials from ‘bad guesses in gray areas.’”) (citations omitted).

90. See *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (“Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . .”); *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (noting that factual determinations made by police need not “always be correct,” but they always must be “reasonable”); *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (“[T]he Court has also recognized the need to allow some latitude for honest [factual] mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.”).

91. 543 U.S. 146, 153-54 (2004).

92. *Id.* at 152.

93. *Id.* 155.

criminal offense as to which the known facts provide probable cause.”<sup>94</sup>

Rounding out this authority, the Supreme Court has rejected the view that it has any institutional role in saying when codes become so “exorbitant” as to not justify enforcement.<sup>95</sup> In a time when state, federal and local codes overflow with not just misdemeanors, but also countless *malum prohibitum* “violations” and “infractions,”<sup>96</sup> threatening fines or very only brief jail terms,<sup>97</sup> police discretionary authority has assumed paramount importance.<sup>98</sup> While reliable data on the number of arrests for low-level offenses is notoriously hard to come by, we know that millions of such arrests occur annually nationwide,<sup>99</sup> dwarfing the number of arrests for more serious offenses.<sup>100</sup>

The numbers, however, risk understating the actual human consequences associated. The personal impact of being taken into custody in public is not to be understated,<sup>101</sup> nor is the invasion of

94. *Id.* at 153.

95. *See* *Whren v. United States*, 517 U.S. 806, 818-19 (1996). *See also* *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 391 (2009) (Thomas, J., dissenting) (specifying a “basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules”). A question also remains regarding the historic common law requirement that a minor offense occur “in the presence” of an officer. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 341 n.11 (2001) (refusing to “speculate” on whether the requirement is of constitutional bearing, inasmuch as the seatbelt violation occurred in the officer’s presence, but stating in dictum that it “is not grounded in the Fourth Amendment.”).

96. For discussion of the often-overlooked role of local governments, in particular, in this regard, *see* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2011).

97. *See, e.g.*, N.Y. PENAL LAW § 10.00(3) (McKinney 2012) (“‘Violation’ means an offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.”). Such laws, it is important to note, enjoy a magnified scope of application based on the capacity of governments to enforce one another’s codes. *See* Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1248 (2010).

98. For discussion of the multi-faceted incentive structure driving such arrests *see* Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1584-85 (2012).

99. *See Table 29: Estimated Number of Arrests*, U.S. DEP’T OF JUSTICE, F.B.I., <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl29.xls> (last visited Dec. 18, 2012, 2012).

100. *See, e.g.*, ROBERT C. LAFONTAINE, S. STRICKLAND, C. BROMAGE, S. GIBSON & A. MASON, NAT’L CTR FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), available at <http://www.courtstatistics.org/Other-Pages/-/media/Microsites/Files/CSP/EWSC-2008-Online.ashx> (noting that misdemeanors comprised seventy-nine percent of court caseloads in eleven states studied).

101. *See United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (describing arrest as “a serious personal intrusion regardless of whether the person seized is guilty or innocent”); *United States v. Marion*, 404 U.S. 307, 320 (1971) (describing arrest as “a public act that may seriously interfere with the defendant’s liberty . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.”); *Gould v. United States*, 255 U.S. 298, 304 (1921) (noting that

privacy<sup>102</sup> attending the search that usually accompanies an arrest.<sup>103</sup> Moreover, today, an arrest often becomes the subject of public notice and ridicule as a result of for-profit published circulars and postings on websites containing mugshots.<sup>104</sup> And, longer term, an arrest, even without conviction<sup>105</sup> or prosecution,<sup>106</sup> can serve as an obstacle to future employment<sup>107</sup> and even result in an enhanced sentence in the event of future conviction.<sup>108</sup>

*Florence* adds to this menu of consequences in an especially significant way. Not only are arrestees subject to the often dangerous, scary, and unhealthy jail environment at the intake stage,<sup>109</sup> but they can be subject to a close “visual inspection” of their naked bodies, without any reason to believe that the areas hide weapons or contraband. Before, pursuant to the Court’s decision in *Bell v. Wolfish* only detainees having had “contact visits” with the outside public were subjected to the experience.<sup>110</sup> Now, the mere status of being an arrestee makes one eligible. To Albert Florence, quite understandably, the experience “was humiliating . . . [making him] less than a man . . . not better than an animal.”<sup>111</sup>

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arrest deprives persons of physical freedom, “the very essence of constitutional liberty”), *abrogated* by *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

102. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (acknowledging that “even a limited search of the person is a substantial invasion of privacy.”) (citation omitted).

103. See Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381 (2001). In addition, it is becoming increasingly common for governments to require that arrestees provide a DNA sample. See Logan, *Policing Identity*, *supra* note 98, at 1586-87.

104. See, e.g., Vince Horiuchi, *Your Mugshot Is Online; It Could Be Gone—For a Price*, SALT LAKE TRIB., Sept. 6, 2011, available at <http://www.sltrib.com/sltrib/home2/52450098-183/com-mugshots-mugshot-florida.html.csp>.

105. See *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (stating that “[a]n arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained.”).

106. See Logan, *Policing Identity*, *supra* note 98, at 1589 (surveying data highlighting frequent non-prosecution of minor offense arrests).

107. See, e.g., Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 520-21 (1985) (noting that applicants for professional licenses usually must acknowledge all arrests).

108. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (2011), available at [http://www.ussc.gov/Guidelines/2011\\_Guidelines/Manual\\_HTML/4a1\\_2.htm](http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/4a1_2.htm).

109. See Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012).

110. See *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

111. Adam Liptak, *No Crime, But an Arrest and Two Strip-Searches*, N.Y. TIMES, Mar. 7, 2011, at A17, <http://www.nytimes.com/2011/03/08/us/08bar.html>. For judicial characterizations of the experience see, e.g., *Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001) (referring to strip search as an “extreme intrusion” and “an offense to the dignity of the individual”) (citation omitted); *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (“The experience of disrobing

Even more troubling, *Florence* affords no assurance that the power to subject individuals to the experience will not be marked by arbitrariness. While Justice Kennedy's opinion reserved judgment on "intentional humiliation and other abusive practices,"<sup>112</sup> it is highly unlikely that such proof of subjective intent will ever be available to an arrestee.<sup>113</sup> The *Atwater* majority freed police to subject persons suspected of committing minor offenses to the "pointless indignity" and "gratuitous humiliations" of arrest,<sup>114</sup> in Gail Atwater's case, by an officer who was a "jerk," seemingly acting out of personal pique toward her.<sup>115</sup> *Florence*, building upon *Atwater*, allows authorities to subject individuals to the far more intrusive and degrading experience of strip searches, without any suspicion whatsoever that they have weapons or contraband.

Even if not motivated by personal animosity, such discretionary authority, as highlighted by Justice O'Connor in her *Atwater* dissent,<sup>116</sup> presents racial bias concern. While the petitioner in *Florence* did not allege that his strip search in particular was racially motivated,<sup>117</sup> arrest statistics showing huge disproportionalities of racial minorities being targeted for low-level offenses,<sup>118</sup> often the result of police enforcement

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and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening."); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (referring to strip search as "demeaning," "humiliating," and "terrifying") (citation omitted).

112. See *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1523 (2012).

113. Indeed, the Court's focus on the subjective intent of individual executive actors itself is curious, as it is customarily ignored in the Fourth Amendment context. See, e.g., *Whren v. United States*, 517 U.S. 806, 814 (1996). Intent is relevant, on the other hand, in the context of programmatic initiatives, such as roadblocks. Brooks Holland, *The Road 'Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 299-327 (2006). However, it is hard to imagine that any jail facility policy would manifest intent to humiliate.

114. *Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47 (2001).

115. Oral Argument at 21, *Atwater*, 532 U.S. 318 (No. 99-1408), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/99-1408.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-1408.pdf) (comment of Kennedy, J.).

116. See *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest.").

117. *Florence* did, however, suggest that his initial stop by police was possibly racially motivated. See *supra* note 8. It is also worth noting that the record indicated that Essex County, New Jersey authorities, when subjecting *Florence* to his second strip search, possibly deviated from policy when they commanded him to "lift his genitals." Justice Kennedy noted, without elaboration, that it was "not clear that this last step was part of the normal process." *Florence*, 132 S. Ct. at 1514.

118. See, e.g., Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana*



strategies,<sup>119</sup> present systemic risk of racialized strip searches.<sup>120</sup>

Finally, *Florence* raises gender-related concerns. Research suggests that authorities already single out females for more intrusive searches than males,<sup>121</sup> and the experience of a strip search, even one not involving physical manipulation of genitalia to allow for internal view<sup>122</sup> or occurring when a subject is menstruating or pregnant,<sup>123</sup> is a traumatic and humiliating event.<sup>124</sup> That such trauma is aggravated in instances when a detainee has suffered past domestic or sexual abuse lends added cause for concern,<sup>125</sup> especially in light of the known high incidence of such abuse among female detainee populations.<sup>126</sup>

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*Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 146 (2007) (noting that 74-91% of persons arrested in New York City between 1992-2003 for low-level marijuana offenses were black or Latino); Aleksandar Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110, 138-39 (2008) (discussing study results showing disproportionate targeting of blacks, compared to whites, in street-level discretionary enforcement of less serious offenses); *see also* Jim Dwyer, *Whites Smoke Pot but Blacks Are Arrested*, N.Y. TIMES, Dec. 22, 2009, at A24, available at <http://www.nytimes.com/2009/12/23/nyregion/23about.html>.

119. *See generally* Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171 (2011) (discussing confluence of geographic deployment, enforcement priority, and enforcement tactics accounting for demographic results).

120. *Cf.* Tim Newburn et al., *Race, Crime and Injustice? Strip Search and the Treatment of Suspects in Custody*, 44 BRIT. J. CRIMINOLOGY 677, 679-85 (2004) (providing results of study in London showing disproportionate targeting of African-Caribbeans for strip searching).

121. *See* Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65, 75-76 (2008) (noting that "quite a few cases allege that women are singled out for more invasive search procedures than men, perhaps because jail authorities believe that vaginal smuggling of contraband is easier (or more common) than anal smuggling, and therefore there is a greater need for highly intrusive searches of women.").

122. *See, e.g.,* *Way v. County of Ventura*, 445 F.3d 1157, 1159 (9th Cir. 2006) (noting experience of detainee forced to "spread her labia . . . to allow a check of the vaginal areas"); Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2747 n.232 (2011) (noting recently discontinued use of a "labia lift" by Colorado Department of Corrections).

123. *See* Schlanger, *supra* note 121, at 75-76.

124. *See* Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women's Prisons*, in *THE VIOLENCE OF INCARCERATION* 121-22 (Phil Scruton & Jude McCulloch eds., 2009) ("Strip searches of women prisoners are experienced as a type of sexual coercion, which . . . undermines self-esteem and self-worth.").

125. *See* Brief Amici Curiae of Domestic Violence Legal Empowerment and Appeals Project et al., *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 2578559 at \*5. *See also* Ha, *supra* note 122, at 2740-43 (surveying social science findings on distinct strip consequences for female detainees).

126. Myrna S. Raeder, *A Primer on Gender-Related Issues that Affect Female Offenders*, 20-SPG CRIM. JUST. 4, 6 (2005) (noting high incidence of reported sexual and physical abuse among female detainees, including 47% of those jailed).

### III. LOOKING AHEAD

In *Florence*, as Professor Carol Steiker observed on the day of its issuance, the Court took a “practice that was not universal and gave it its constitutional imprimatur.”<sup>127</sup> In the absence of a federal constitutional limit,<sup>128</sup> it is worth considering whether suspicionless strip searches might be limited by other avenues.

First, as invited by the *Florence* majority, the political process could conceivably curtail strip search authority.<sup>129</sup> Already at the time of *Florence*, several states imposed legislative limits on strip search authority, requiring that authorities have reasonable suspicion that arrestees are in possession of weapons or contraband.<sup>130</sup> Whether these jurisdictions will maintain their policies, however, remains an open-question.<sup>131</sup> Knowledge of the public choice and political process dynamic operative in the criminal justice realm, however, does not give reason to be optimistic that such limits will become more common, much less endure. Indeed, it is worth recalling that *Atwater* invited a legislative limit on police minor offense arrest authority. Yet, when acted upon by the Texas Legislature, the measure was vetoed by Governor Rick Perry amid strong law enforcement opposition.<sup>132</sup>

A similar political dynamic can be expected with respect to strip searches, if the vigorous amicus efforts of corrections officials in the *Florence* litigation can serve as a gauge.<sup>133</sup> It may be that the distinctly

127. Nina Totenberg, *Supreme Court Ok's Strip Searches for Minor Offenses*, NAT'L PUB. RADIO, Apr. 2, 2012, <http://www.npr.org/2012/04/02/149866209/high-court-supports-strip-searches-for-minor-offenders>.

128. For discussion of the quixotic hope of constitutional limits being imposed on policing more generally, see Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 768-81 (2012).

129. See *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1522 (2012) (noting that “individual jurisdictions can of course choose to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenders.”).

130. See David M. Shapiro, *Does the Fourth Amendment Permit Indiscriminate Searches of Misdemeanor Arrestees?: Florence v. Board of Chosen Freeholders*, 6 CHARLESTON L. REV. 131, 154 n.115 (2011).

131. See Totenberg, *supra* note 127 (noting that it remains to be seen “whether states that have forbidden this practice will now move to permit blanket strip searches of those arrested for minor charges.”).

132. See Logan, *Street Legal*, *supra* note 66, at 448.

133. See Brief of Amicus Curiae New Jersey County Jail Wardens Association in Support of Respondents, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3841659 (2011); Brief for Respondents Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, Individually and in His Official Capacity as Warden of Burlington County Jail; John Does 1-5 of Burlington County Jail, individually and officially, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3706116 (2011); Brief for Respondents Essex County Correctional Facility and Essex County Sheriff's Department, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3739474

more significant personal consequences of *Florence* will galvanize public concern and motivate legislative action.<sup>134</sup> However, *Atwater* too involved facts that resonated strongly with the public: an upper-class “soccer mom” arrested, in the presence of her crying children, for the fine-only offense of not wearing a seatbelt.<sup>135</sup>

Alternatively, state courts, taking a page from Justice Brennan’s exhortation to look to their state constitutions to afford more in the way of civil liberty protection,<sup>136</sup> could limit strip searches. Indeed, some state courts have disavowed *Atwater*, imposing a state constitutional limit on the power of police to engage in warrantless arrests for petty offenses.<sup>137</sup> The vast majority of state courts, however, have aligned themselves with *Atwater*, again undercutting hope of similar judicial resolve in the strip search context.<sup>138</sup> Finally, the human impact of *Florence* could well be mitigated by broader shifts in the criminal justice system, in particular, the move toward decriminalization and increased use of civil citations. Jurisdictions, in keeping with recent urging of the American Bar Association,<sup>139</sup> are showing increasing interest in slowing the influx of minor offense arrestees,<sup>140</sup> which would lower the volume of strip searches. Consistent with the broader “right on crime”

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(2011); Brief for the National Sheriffs’ Ass’n, et al. as Amici Curiae Supporting Respondents, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3584758 (2011); Brief of Current and Former Jail and Corrections Professionals as Amici Curiae in Support of Petitioner, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 2593461 (2011).

134. In a poll administered by researchers at Farleigh Dickinson University on the day *Florence* was decided, 65% of registered voters disagreed with the outcome, opining that jail officials should have individualized suspicion that an arrestee possesses a weapon or contraband before conducting a strip search, especially if the basis for arrest is a minor offense. FSU MindPoll, *Nation Sides with New Jersey Motorist Against Court, Automatic Strip Searches*, Apr. 3, 2012, <http://www.ahherald.com/newsbrief-mainmenu-2/monmouth-county-news/12892-nation-sides-with-new-jersey-motorist-against-court-automatic-strip-searches>.

135. See Logan, *Street Legal*, *supra* note 66, at 419-20 n.6 (noting widespread outrage on the nation’s editorial pages to *Atwater*’s outcome).

136. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

137. See *supra* note 71.

138. See, e.g., Rankin v. Colman, 476 So. 2d 234, 238 (Fla. Dist. Ct. App. 1985); State v. Nieves, 861 A.2d 62, 76-77 (Md. 2004); People v. Barnville, 819 N.Y.S.2d 234, 236-37 (N.Y. App. Div. 2006); McGee v. State, 105 S.W.3d 609, 616-17 (Tex. Crim. App. 2003); Plemmons v. Pierce Cnty., 134 Wash. App. 449, 455-62 (Wash. Ct. App. 2006).

139. See *The State Policy Implementation Project: Making Connections*, ABA CRIM. J. SECTION NEWSLETTER (Am. Bar Ass’n), Spring, 2012, available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_section\\_newsletter/new\\_sletter\\_spring2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_section_newsletter/new_sletter_spring2012.authcheckdam.pdf).

140. *Id.* For discussion of the impact of the recent economic downturn on state and local criminal justice systems, see Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193 (2012).

movement,<sup>141</sup> the shift has appeal for cash-strapped local governments, faced with the costs of housing and processing such arrestees, and has the added bonus of generating revenue.<sup>142</sup> Looking ahead, it would appear that, strategically, it is by playing to this pragmatic motivation, more than any humanitarian impulse, that civil libertarians can most profitably dedicate their energies.

#### IV. CONCLUSION

*Florence*, when combined with other Supreme Court decisions affording executive actors expansive discretionary power in their handling of low-level offenders, represents a singularly troubling development. It could be that sometime soon technological developments, providing a readily available, cheap and fail-proof means of searching the bodies of detainees, will overtake its practical significance.<sup>143</sup> Yet, the stark constitutional reality remains that nothing in *Florence* necessitates that anything other than the intrusive techniques experienced by Albert Florence will be deployed in the nation's jails and detention centers.<sup>144</sup>

Two decades ago, the mere idea that a warrantless arrest detainee would be subject to pretrial detention for up to forty-eight hours, without judicial review of the legal propriety of the detention, inspired Justice Scalia's ire: "Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle . . . . In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as their own."<sup>145</sup> One can only wonder why similar outrage did not motivate Justice Scalia to join the dissent and change the outcome in *Florence*, a case in which an admittedly wrongly arrested

141. See *The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers*, RIGHTONCRIME.ORG, <http://www.rightoncrime.com/> (last visited Dec. 18, 2012).

142. *The State Policy Implementation Project*, *supra* note 139.

143. Indeed, Florence, in his petition for certiorari directed the Court's attention to the current use of technological advances, such as the "Body Orifice Scanning System" and full body scanners, avoiding need for strip searches, which went unacknowledged by members of the *Florence* Court. See *Florence v. Bd. of Chosen Freeholders of the Cty. of Burlington*, Motion and Filing of Petition for a Writ of Certiorari, 2011 WL 220710 \*21-22 (Jan. 19, 2011).

144. Cf. *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (noting that Fourth Amendment reasonableness of government activity "does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.") *Bell v. Wolfish*, 441 U.S. 520, 559 & n.40 (1979) (expressing strong reservation over "less intrusive alternative[]" requirement in assessing reasonableness of visual body cavity searches of pretrial detainees following contact visits with outsiders).

145. *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).

citizen suffered a far more traumatic experience—a strip search. Be that as it may, Justice Scalia’s account, juxtaposed against the facts and outcome of *Florence*, underscore the Court’s willingness to elevate the administrative interests of government over the privacy interests of minor offense arrestees.